No. 2751

In the United States Circuit Court of Appeals

For the Ninth Circuit

MARYLAND CASUALTY COMPANY of Baltimore, Maryland, a corporation,

Plaintiff in Error.

VS.

ORCHARD LAND AND TIMBER COMPANY, a corporation,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the District Court of the United States for the District of Oregon.

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STATEMENT OF THE CASE.

This is an action upon an employer's liability policy of indemnity insurance. The complaint alleges in substance the corporate capacity of the parties, and that on June 5, 1912, the defendant (plaintiff in error) issued to the plaintiff (defendant in error) its contract of in-

surance wherein the defendant did contract and agree to indemnify the plaintiff against loss from the liability imposed by law upon the plaintiff for damages on account of bodily injuries, including death, resulting therefrom suffered by any employee of the plaintiff while upon the premises of the plaintiff in and about its saw mill in Lane County, Oregon. The limit of the policy for an accident to one person resulting in bodily injuries or death was $5,000.

O. W. Dunn, an employee, was injured while working in plaintiff's saw mill while said contract of insurance was in force, and brought an action to recover damages therefor in the sum of $15,000. Under the terms of said contract of insurance the defendant did not settle said claim or action, but assumed charge and control of the action, which resulted in a judgment against the plaintiff in the sum of $7,500 and costs taken at $102.60. Thereafter on behalf of the plaintiff the defendant took an appeal to the Supreme Court of the State of Oregon where the judgment was affirmed on December 9, 1913.

The complaint further alleges, "That on or about the 11th day of November, 1914, the plaintiff settled said claim and *paid* said judgment and procured a release and satisfaction thereof; that plaintiff has duly kept and performed each and every term and stipulation and condition of said contract of insurance to be by it kept and performed; that said plaintiff *settled* and *procured* a *discharge* of *said judgment for the sum of $7,602.60;* that by reason of the aforesaid facts, plaintiff has suf-

fered, as result of the injuries and the judgment rendered in favor of the said Dunn, in the sum of $7,602.60; that by the terms of said contract of insurance the defendant contracted and agreed to and with the plaintiff to compensate, indemnify and reimburse the plaintiff in the sum of $5,000 because of loss imposed upon plaintiff by the said injuries and the judgment rendered as a result thereof;

"That defendant has failed and refused to indemnify the plaintiff in the sum of $5,000 or any part thereof; that by reason of the facts aforesaid, defendant is indebted to the plaintiff in the sum of $5,000."

The answer denies the allegations of payment and satisfaction of said claim and judgment for the sum of $7,602.60 and the loss suffered by the plaintiff, and further alleges that Maryland Casualty Company by said policy of insurance agreed to indemnify the Orchard Land and Timber Company against loss from liability imposed by law for damages on account of bodily injuries, including death, resulting therefrom accidentally suffered by any employee, and that the plaintiff has not sustained any loss on account of the injuries suffered by said O· W. Dunn, and that plaintiff did not at any time pay the judgment referred to in plaintiff's complaint.

The testimony of Charles A. Hardy, attorney for plaintiff in this action, and attorney for O. W. Dunn in the state court, showed that about the time Dunn secured a judgment against the plaintiff in the state court,

Mr. Brainard, who was the chief stockholder of the plaintiff corporation, organized the Brainard Timber Company, and the property of the Orchard Land and Timber Company was transferred to the new company, and the Orchard Land and Timber Company ceased to do business. When the action in the state court was affirmed by the Supreme Court, Mr. Hardy had an execution issued and a garnishment served upon the Maryland Casualty Company, which process was removed to the federal court where a plea of abatement was filed, stating that the Orchard Land and Timber Company had not paid its license fee to the corporation department, and asked to have the case abated. Mr. Hardy advanced the money to pay the license fee of the Orchard Land and Timber Company and procured its reinstatement.

After that proceeding was dismissed an understanding between Mr. Hardy and Dunn and the Orchard Land and Timber Company was reached whereby the Orchard Land and Timber Company, on November 11, 1914, executed a 90-day promissory note to Dunn in the sum of $7,602.60, without interest, and Dunn satisfied the judgment.

Neither Mr. Hardy nor Dunn made any attempt to collect the note, nor has it been paid.

The trial court found that by giving the promissory note, plaintiff suffered and sustained damages and a loss in the sum of $5,000 and interest thereon from the date of filing complaint in the sum of $246.50. Judgment was entered against the defendant for $5,246.50

and costs taxed at $20.40. Thereafter defendant's motion to set aside judgment and for a new trial was overruled.

SPECIFICATIONS OF ERRORS

The following are the specifications of errors relied upon by the plaintiff in error, and which are intended to be urged by it on the writ of error as grounds of reversal of the judgment of the District Court, and (omitting No. 1) are identical with the errors suggested under the head of "Assignment of Errors" in the printed transcript of record commencing at page 35 thereof, to-wit:

"I.

"The court erred in not making Findings of Fact and Conclusions of Law in this cause covering the issues presented by the pleadings in this action.

II.

"The court erred in making the so-called Findings of Fact because there was no evidence and not sufficient evidence to justify and support the said so-called Findings of Fact.

III

"The court erred in signing the Conclusion of Law that it did in this cause because the evidence and findings were not sufficient to justify or support or authorize the same.

IV.

"The court erred in entering judgment in this matter in favor of the plaintiff and against the defendant because there was no evidence to justify the same.

V.

"The court erred upon the trial of this cause rendering judgment against said defendant and in favor of said plaintiff for any sum whatever.

VI.

"The court erred in not granting defendant a new trial in this action, which is as follows:

" 'The defendant moves the court for an order to set aside the judgment hertofore entered in the above entitled action, and for a new trial, upon the ground and for the reason:

I.

" 'Insufficiency of the evidence upon the trial to justify the Findings of the Court, and the judgment entered thereupon.

II.

" 'That the Findings, Conclusions of Law and Judgment are against the law." '

ARGUMENT

The question in this case is whether the defendant in error has suffered a loss or has been damaged within

the meaning of the terms of the policy which "agrees to indemnify the Orchard Land and Timber Company against loss from liability imposed by law on account of bodily injuries, etc." suffered by an employee (Record, p. 20). This question is involved in each assignment of error urged, and to avoid repetition we will consider the assignments of error collectively.

The policy in question is an agreement to indemnify against loss, and the employer can recover no more than he has actually suffered in damages by payment of the judgment recovered by an employee.

In Fidelity & Casualty Company of New York v. Martin, 173 S. W. (Ky.) 307, a policy involving terms which are similar to the one in this case, and which agreed to indemnify the assured against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, etc., the court held that this was a policy indemnifying against loss and not against liability, and that the assured must suffer actual loss before the insurer was liable. The court says on page 310:

"By Clause R of the policy the company's liability for loss from an accident resulting either in bodily injuries to or in the death of one person is limited to $5000, and such expenses as it may incur in defending any suit, including the interest on and verdict or judgment and any costs taxed against the assured.

"In view of the great weight of authority to that effect, it is our conclusion that the policy here involved indemnifies against loss and not against liability."

In Campbell v. Maryland Casualty Co., 97 N. E. (Ind.) 1026, a similar policy was under consideration which agreed to indemnify the assured against loss from common law and statutory liability for damages on account of bodily injury to employees. The court construed this part of the policy as a contract of indemnity and says:

"If the policy sued on is a contract to indemnify against loss, it is necessary to show a damage before there can be a recovery. . . . On the other hand, if the policy sued on is a contract to protect the assured against liability merely, an action may be brought and a recovery had as soon as the liability is legaly imposed, regardless of the question as to whether or not actual loss or damage has been suffered. . . . The distinction observed between contracts to indemnify against loss, and contracts to protect against liability, is recognized by practically all the cases cited."

But there was another provision of the policy which was contained in a slip or paster attached thereto which the court held made the policy one insuring against liability.

The case of Carter v. Aetna Life Insurance Co, 91 Pac. (Kans.) 178, 11 L. R. A. (N. S.) 1155, is one where the assured held a policy of indemnity insurance similar to that in this case, and while the policy was in force an employee was injured and the attorneys for the insurance company defended the action which resulted in a verdict against the assured. While the action was pending the assured was adjudicated a bankrupt and its

assets were taken over and administered. The judgment creditor sought to have the insurer pay his judgment against the assured, and the court held that the contract was one of indemnity and the assured must suffer loss before there was liability upon the policy. The court says, at page 178:

"The contract was indemnity against loss from liability, and not insurance against liability. In its general features, it provided for making good the loss suffered by the assured, or rather for reimbursing it to the extent of its loss. Until the assured had met with a loss, there was no occasion to pay indemnity; no reason to reimburse, until something had been paid by the assured."

To similar effect is Allen v. Aetna Life Insurance Co., 145 Fed. 881, 7 L. R. A. (N. S.) 958, where a judgment creditor sought to garnishee an insurance company which carried liability insurance for a judgment debtor, his employee, and the court held that the liability of the insurer was only to indemnify the asured against loss, and no valid claim existed against it until the judgment should be paid by the assured, and for that reason was not liable to the plaintiff on the judgment as garnishee

In Atlas Hardwood Lumber Co. v. Georgia Life Insurance Co., 167 S. W. (Tenn.) 109, a similar policy was construed and the court says at page 110:

"It will be observed that by the terms of the policy the insurance company agrees to indemnify the assured against loss on account of accident covered thereby, and

does not agree to indemnify the assured against liability from loss on account of such accidents.

"This distinction is well recognized in law, and has been taken by this court in two cases: Finley v. Casualty Company, 113 Tenn. 592, 83 S. W. 2; . . . Cayard v. Robertson, 123 Tenn. 382, 131 S. W. 864, 30 L. R. A· (N. S.) 1224 . . .

In Finley v. Casualty Co., supra, the authorities are reviewed at length, and this court said that under policies insuring against indemnity from loss, 'the amount of insurance does not become available until the assured has paid the loss, and is not even then available unless proper notice has been given as provided in the policy.'

"As stated above, the assured in this case has not paid the loss, and the authorities approved in Finley v. Casualty Co., and upon which that case rests, held that such payment is a condition precedent to the maintenance of a suit against the indemnity company on such a policy. In other words, the cases hold that until the claim or judgment against the assured has been paid by him, he has sustained no loss, and therefore he has no claim under a policy insuring him against loss."

In Lowe v. Fidelity & Casualty Co., 87 S· E. (N. C.) 250, the court says on page 251:

"Upon the second ground of defense we are of the opinion that plaintiff is not entitled to recover $5000. The contract does not indemnify the assured against liability but only against actual loss. It is admitted that

the judgment has not been paid; that being so plaintiff has suffered no loss and cannot recover."

To the same effect, Wisconsin Zinc Co. v. Fidelity & Deposit Co. of Maryland, 155 N. W. (Wis.) 1085.

In Moses v. Travelers Insurance Co., 49 Atl. (N. J.) 720, the policy insured against loss sustained by an employer through accidents happening to his employees, the court held that not the amount of the employee's judgment, but the amount paid by the employer thereon was the sum for which the insurer was responsible. The assured was adjudged a banqrupt, and the court held that whatever was paid upon the judgment by the trustee in bankruptcy was the amount for which the insurer was liable.

In Fenton v. Fidelity & Casualty Co., 36 Or. 283, Willamette Steam Mills, Lumber & Mfg. Co. carried a policy of insurance written by the Fidelity & Casualty Company, and while the policy was in force one of the employees of the assured was injured and the plaintiff, who was a physician and surgeon, was employed by the assured to attend the injured. Shortly afterward the mill company became insolvent and the policy of insurance was assigned to the plaintiff and was accepted by him in full payment and satisfaction for his claim for services, and he thereupon brought the action to recover for said services. The court held that the term "does hereby agree to indemnify against liability for damages on account of fatal or non fatal injuries accidentally suffered by an employee' was an insurance against liability. The court says on page 288:

"There is a distinction made by the authorities between a contract of indemnity against liability for damages, and a simple contract to indemnify against damages. In the former case it has very generally been held that an action may be brought, and a recovery had, as soon as the liability is legally imposed, while in the latter there is no cause of action, until there is actual damage (citing authorities). If, therefore, the policy upon which this action is based is a mere contract of indemnity, the payment by the mill company of the liability incurred by it for the services of the plaintiff is a condition precedent to the right of recovery"

In Scheuerman v. Mathison, 70 Or. 40, 144 Pac. 1177, the firm of Mathison & Anderson, the defendants, carried an employer's liability policy issued by the Pacific Coast Casualty Company. Scheuerman, an employee of the defendants, was injured while the policy was in force and recovered a judgment. The defense of the action was handled by attorneys for the insurance company. After the plaintiff obtained his judgment, he caused a writ of execution to be issued upon said judgment and collected thereon the sum of $124, and said sum was all that the defendants paid upon said judgment. Thereupon the judgment creditor sought to garnishee the Pacific Coast Casualty Company, the insurer. The policy insured against loss and expense arising from claims on account of bodily injuries or death accidentally suffered by an employee. As a further provision that no action should lie against the insurer for any loss or expense under the policy unless it shall be brought for loss or expense actually sustained and paid

in satisfaction of a final judgment within ninety days from the date of said judgment and after trial of the issue. The court held that the contract insured against actual loss, and for that reason the insurance company was only liable for what the assured actually paid upon the judgment, which was the sum of $124. The court says on page 56:

"The right to recover from a casualty company is limited to the amount of loss or expense actually sustained and paid in the satisfaction of a final judgment obtained by the injured employee against the company. The obtaining of a final judgment against the assured by the injured employee and the payment of that judgment in whole or in part are conditions precedent to the right of the assured to maintain an action against the casualty company on such policy, and until the assured has a right of action against the company, an injured employee, who has obtained a final judgment against the assured, has no right to garnish the company. Until the assured has paid the injured employee his judgment, or a part thereof, the company does not owe the assured anything and there is nothing in his hands to attach or garnish."

There can be no question about the meaning of the terms of this policy. That it is a policy of indemnity insurance is recognized by the plaintiff. The action is brought upon that theory, for in the complaint it is alleged:

"That on or about the 11th day of November, 1914, the plaintiff settled said claim, and paid said judgment, and procured a release and satisfaction thereof. That

plaintiff has duly kept and performed each and every term, stipulation and condition of said contract of insurance, to be by it kept and performed. That said plaintiff settled and procured a discharge of said judgment for the sum of $7602.60; that by reason of the aforesaid facts, plaintiff has suffered as a result of the injuries and the judgment rendered in favor of the said Dunn, in the sum of $7602.60. That by the terms of said contract of insurance, the defendant contracted and agreed to and with the plaintiff, to compensate, indemnify and reimburse the plaintiff in the sum of $5000.00, because of loss imposed upon plaintiff by the said injuries, and the judgment rendered as a result thereof. That defendant has failed, neglected and refused to indemnify the plaintiff in said sum of $5000.00, or any part thereof." (Record, pp. 8, 9.)

Has the plaintiff proved these allegations? Has it paid the judgment for the sum of $7602.60 as alleged? The evidence shows that plaintiff executed a ninety-day promissory note without interest for the amount of the judgment, and the judgment creditor satisfied the judgment, the note and a certified copy of the judgment docket of the circuit court of Lane County, Oregon, were introduced in evidence (see Record, pp. 48, 56-57), and no explanation whatever was offered by the plaintiff concerning the transaction.

Payment of the judgment by the plaintiff is a condition precedent, and it must prove payment as alleged. It must aver and prove full performance.

In Cranston v. West Coast Life Insurance Co., 63

Or. 427, an action was brought upon the policy of life insurance. A promissory note had been given in payment of the premium. The policy required the premium to be paid before it went into effect. The plaintiff alleged that the policy was issued and that the premium had been paid, and that the insured had performed all the agreements and conditions of the policy on his part. The court says on page 436:

"By its terms it is based upon the payment of $27.95 on September 1, 1910, which payment consequently is a condition precedent to the requiring of any disbursement on the part of the defendant. As said by Mr. Justice Bean in Faber v. Hougham, 36 Or. 428, (59 Pac. 547): 'It is familiar law that, if an action be brought on the covenants of an executory contract, it is necessary as a general rule for the plaintiff to aver and prove full performance on his part. . . . These questions are learnedly discussed by Mr. Clark in his excellent work on Contracts, and as applicable to the case at hand we take the rule to be as stated by him: 'When it appears that one of two covenants or promises is to be performed at an earlier date than the other, the rule is simple and uniform, namely, that the convenant or promise that is to be performed first is independent and absolute, while the one that is to be performed last is dependent upon the performance of the former being a condition precedent to the performance of the latter.'

"If, therefore, nothing else is shown it is incumbent upon the plaintiff to show performance of the condition of payment of the premium, and with that principle in

view she has alleged: 'That up to the time of the death of the said Walter A. Cranston all premiums which accrued on said policy were paid at the time they accrued, and that in all other respects said Walter A. Cranston duly performed all the agreements and conditions of said policy on his part' Having therefore alleged payment or performance, the plaintiff must prove the same when the allegation is traversed or she cannot prevail."

So it is contended that since the plaintiff has alleged payment of said judgment for said sum of $7602.60, it must prove that it actually paid that sum for the satisfaction of the judgment.

Mr. Justice Burnett, in the Cranston case, supra, defines payment as follows:

"Payment is the discharge of an obligation by the delivery and acceptance of money or of something equivalent to money which is regarded as such at the time by the party to whom the payment is due.

"Said Mr. Chief Justice Lord in Bush v. Abraham, 25 Or. 336, 35 Pac. 1066: 'Payment, in a restricted sense, is a discharge in money of a sum due. As usually understood, it means the transfer of money from one person, who is the payor, to another, who is the payee, in satisfaction of a debt. In such sense, it would not include an exchange or compromise, or an accord and satisfaction, but would mean the full satisfaction of a debt in money. But, in its general sense, payment is the performance of an agreement, or the fulfillment of a promise or obligation, whether it consists in giving or doing. The dis-

charge of a contract or obligation in money or its equivalent, with the assent of the parties, would constitute payment. It may be made in something else than money; in fact, anything that the creditor will accept as payment. It is a mode of extinguishing obligations. To constitute payment, therefore, money, or some other valuable thing, must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor receive it for the same purpose."

"Other definitions are as follows:

"A payment is defined to be the performance of an obligation for the delivery of money.

"Payment is defined to be the act of paying; the delivery of money in the course of business.

"Payment is defined to be the act of paying, or that which is paid; discharge of a debt, obligation or duty; satisfacton of a claim; recompense; the fulfillment of a promise or the performance of an agreement; the discharge in money of a sum due.

"In legal contemplation payment is the discharge of an obligation by the delivery of money or its equivalent, and is generally made with the assent of both parties to the contract." 6 Words and Phrases 5247, and authorities there cited"

Accepting a promissory note is not to be considered as taken in discharge of a debt unless it is at the time so agreed and understood. There must be an indubitable agreement that the debtor must look solely to the note for the payment.

In Leschen & Sons Rope Co. v. Mayflower, Etc., Co., 173 Fed. 855, 35 L. R. A. (N. S.) 1, the court in considering the question of a promissory note as payment of a debt, says on page 857:

"The acceptance by a creditor of the promissory note of his debtor for his antecedent debt does not distinguish it, unless the note is paid. It is not an absolute, but a conditional, payment of the debt (citing authorities). A clear agreement by the creditor that he will take the risk of the payment of the note and that the debt is discharged thereby, or the indubitable intention of both parties to that effect, is requisite to extinguish the debt by the taking of the debtor's note. An agreement that a debt shall be paid, or shall be payable, or that it has been paid by the note of the debtor, is a contract for an extension of the time of payment, and that the debt shall be paid, or that it has been paid, by the note of the debtor on condition that the note is paid, but not otherwise."

In Cranston v. West Coast Life Ins. Co., supra, 63 Or. 438, the court says:

"In Stringham v. Mutual Insurance Co, 44 Or. 447, 459, (75 Pac. 822), Mr. Justice Wolverton says: 'It has been firmly settled by this court that the acceptance of a note is not to be considered as taken in discharge or payment of the debt unless it is at the time so agreed and understood (citing authorities).' "

To thee same effect are Clarke-Woodard D. Co. v. Hot Lake S. Co., 75 Or. 235, 146 Pac. 135; Seaman v.

Muir, 72 Or. 583, 44 Pac. 121; Matlock v. Scheuerman, 51 Or. 49, 93 Pac. 832, 17 L. R. A. (N. S.) 747.

Therefore it is contended that since there is no agreement or testimony that the judgment creditor accepted this note in payment of said judgment, the payment of the same has not been made.

A convincing circumstance showing that the note was not intended as payment of the judgment is the testimony of Mr. Hardy, attorney for Dunn in the state court, and attorney for plaintiff in the action at bar. Mr. Hardy's testimony shows conclusively that the whole transaction of giving the note and satisfying the judgment is a fabrication and lacks every element of good faith.

The fact that Mr. Hardy testified that the Orchard Land and Timber Company assigned the policy in question to Dunn as security for the note shows that there was no agreemnt that he was to look to the Orchard Land and Timebr Company to pay the note. There was no showing whatever that the note given by the plaintiff in this action was a good commercial paper and collectible. On the contrary, Mr. Hardy testified that about the time his client, O. W. Dunn, secured a judgment against the Orchard Land and Timber Company a new company was organized and the property of the Orchard Land and Timber Company was assigned to the new company and the old one ceased to do business. Further, Mr. Hardy never attempted to collect the judgment against the Orchard Land and Timber Company but sought to garnishee the Maryland Casualty Com-

pany, and when that proceeding was removed to the federal court it was ascertained that the judgment creditor, the Orchard Land and Timber Company, had not even paid its license fees to the corporation department, and Mr. Hardy advanced the money in order to maintain his proceeling. The testimony of Mr Hardy is most convincing that the note was not given in good faith, but was a scheme upon his part and that of Mr. Brainard, who was the chief stockholder in the Orchard Land and Timber Company, and the organizer of its successor to collect this policy of insurance without performance of the agreements and terms therein contained. The note executed by the Orchard Land and Timber Company is worthless, uncollectible and of no value, because it was hopelessly insolvent, and had no assets or property. (Record, pp. 49-55.)

Where a note is given in satisfaction of a judgment it must be given in good faith and must be of value and collectible before the judgment debtor suffers a loss.

Stenbohm v. Brown Corliss Engine Co., 119 N. W. (Wis.) 308, 20 L. R. A. (N. S.) 956. In this case the plaintiff secured a judgment against the defendant, who carried liability insurance. Shortly after the action was instituted, the defendant was adjudicated a bankrupt and a receiver in bankruptcy was appointed. After the judgment, by supplemental proceedings, the plaintiff had a receiver appointed. The receiver then petitioned the bankruptcy court that thetrustee in bankruptcy assign and turn over to such receiver the policy of indemnity insurance, which petition was granted,

demand was thereupon made upon the insurance company, and later the receiver filed a petition which set forth that the plaintiff was willing to compromise and settle his claim for $5000 and would accept the receiver's promissory note for that sum in settlement and satisfaction of the judgment The court ordered the receiver to execute a demand promissory note to the plaintiff in settlement of the judgment and authorize the receiver to commence suit on the policy of insurance. The note was executed and delivered to the plaintiff, and he satisfied the judgment, whereupon the receiver commenced an action against the insurance company to collect the amount alleged to be due on the policy. After the action was commenced the Brown Corliss Engine Company, the defendant, moved for an order vacating and setting aside the ex parte order, authorizing the settlement and execution of the note and the commencement of the action against the insurance company. The motion was granted, and upon appeal this order was assigned as error. The court says at page 309:

"On its face the action taken was a mere subterfuge, resorted to for the purpose of making a nominal compliance with the terms of the insurance contract. The contract was one which the parties thereto had a right to make, and it would be trifling with its terms for a court to hold that the shadowy payment here attempted to be made conformed to its requirements. There was no bona fide payment of the judgment. The fictitious payment resorted to is too thinly veiled to stand the test of judicial scrutiny."

In Kennedy v. Fidelity and Casualty Co. of New York, 110 N. W. (Minn.) 97, 9 L. R. A. (N. S.) 478, four notes were given by the assured to the judgment debtor, which notes were endorsed by a guarantor, and after the action was instituted $202 was paid by the assured upon said notes. The insurance policy in that case was one of indemnity and the court found that the transaction was made in good faith. This necessarily must be so, because it is only fair to assume that the notes were of value and could be realized upon by the judgment debtor, else payment would not have been guaranteed and the payment of $202 would not have been made· The court says:

'So far as the record shows, the assured paid the judgment in *good* commercial paper, and there is nothing upon the face of the transaction to indicate that the arrangement was made for a fraudulent purpose."

This case is commented upon in Stenbohm v. Brown Corliss Engine Co., supra, 119 N. W. 309, where the court says:

"No good reason is apparent why the payment which the contract obligates the assured to make as a condition precedent to his right to maintain an action upon the policy might not be made otherwise than in money, *provided such payment is made and accepted in good faith and there is a bona fide settlement and satisfaction of the judgment secured by the injured employee.*"

This case is cited in Herbo-Phosa Co. v. Philadelphia

Casualty Co., 84 Atl. (R. I.) 1097, where the court says:

"The courts have held that a payment in cash is not necessary and may be otherwise made, as, for instance, by a note, provided the judgment against the assured is extinguished and the transaction is in good faith."

In Seattle S. & F. Ry. Co. v. Maryland Casualty Co., 96 Pac. (Wash.) 509, 18 L. R. A. (N. S.) 121, an employee recovered a judgment of $25,000 against his employer who carried an employer's liability policy. After the judgment was obtained, the employer refused to settle and the judgment creditor, the employee, sold and assigned his judgment for the sum of $14,000, which was paid in cash. After the judgment appealed from was affirmed by the superior court of the State of Washington, the assured executed its note to the assignee of the judgment for the full sum of the judgment and costs. The court there found that the transaction was in good faith, and we think that it can be unquestioned because $14,000 in cash was paid by the assignee of the judgment, and it is very clear that that sum would not have been paid unless the judgment debtor had assets sufficient to satisfy the judgment.

This case is annotated under West River Coal Co. v. Maryland Casualty Co., 48 L. R. A. (N. S.) 196, where the language is as follows:

"It has been held that the execution by an employer who holds an indemnity policy, of his note in good faith, in satisfaction of a judgment against him by an injured

employee, is a payment within the meaning of the provision of the indemnity policy stipulating that no action should lie against the insurer except to reimburse the insured for loss actually sustained and paid by him in satisfaction of a judgment after trial of issue."

Also in 20 L. R. A. (N. S.) 956, the editor says the following in reference to Kennedy v. Fidelity & Casualty Co, supra:

"Since that decision was rendered, and in reliance upon the rule enunciated therein and in the cases cited in the note thereto, it was held in Seattle & S. F. R. & N. Co. v. Maryland Casualty Co., 50 Wash. 44, 18 L. R. A. (N. S.) 121 that the execution by an employer of his note in good faith, in satisfaction of a judgment against him, obtained by his employee, was within the meaning of an indemnity policy which provided that no action should lie against an insurer as respects any loss except to reimburse the injured for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

In Taxicab Motor Co. v. Pacific Coast Casualty Co., 132 Pac. (Wash.) 393, a promissory note was given to the holder of a judgment under the authority and with the sanction of the probate court, and in that case it must be assumed that the good faith in the transaction was beyond question and the note given by the assured must have been collectible. After the note was executed by the assured he brought an action against the insurer.

The defense was made that the note was not given

in good faith with the intent that it should afterwards be paid. The court says:

"But we fail to discover in the evidence anything that seems to justify this conclusion. The direct evidence of the parties making the settlement is to the contrary, and it will be remembered that the terms of the proposed payment and satisfaction were made known by the administratrix to the judge sitting in probate and receive his sanction and approval before the settlement was made. It seems to us that this latter fact is alone sufficient to dispel any idea of bad faith that might arise upon the transaction itself, and sufficient to require some direct and cogent proof of bad faith before it can be held that the transaction is not what it purports to be."

In all the cases where a promissory note is given in payment of a judgment the courts hold that the transaction must be in good faith and the note must be of value and collectible. We submit that the Orchard Land and Timber Company and Dunn, through his attorneys, have not acted in good faith, and that the note which was executed was not received with the understanding that it should be paid, and further it is entirely worthless and uncollectible. The whole transaction was a subterfuge to make recovery upon the policy of indemnity insurance possible.

The defendant in error has suffered no loss, nor has it sustained damage by the execution of its note. The satisfaction of the judgment is in the nature of a receipt and was fully explained and qualified by the testimony of Mr. Hardy.

23 Cyc. 1497.

The satisfaction of the judgment obtained by Orchard Land and Timber Company could be vacated and stricken off because it was obtained without consideration and upon a consideration which has failed, or because there is failure to perform the conditions of the settlement between the parties.

23 Cyc. 1500.

The plaintiff alleges that it has performed all the agreements and conditions upon its part to be kept and performed and has paid the judgment for the sum of $7602.60. This allegation is denied by the answer. Under general denial fraud or collusion can be raised.

Campbell v. Maryland Casualty Co., 97 N. W. (Ind.) 1027.

In this case the defendant set up in its answer that the judgment was not paid in good faith and the money was in fact advanced by the attorneys of the employee of the plaintiff. The plaintiff filed a demurrer to this answer which was overruled, and such ruling was assigned as error upon appeal. The court says:

"The facts stated in this paragraph of the answer show that the Carmichael judgment was not paid in good faith before the commencement of this action. If it is necessary to a recovery by plaintiff that he should allege and prove that the judgment upon which he bases his claim, or some part of it, has been paid, then the facts alleged in this paragraph of the answer could be properly

proved under the general denial and a ruling on demurrer, if wrong, would be harmless."

At the trial of this case the defendant in error made the point that the Maryland Casualty Co. should be estopped from denying its liability because it assumed control of the defense of the action in the state court under the terms of the policy. The fact that the insurer assumed control of the defense does not affect the rights of the parties.

Fidelity & Casualty Co. v. Martin, 173 S. W. 307.

The court says on page 310:

"But there is nothing in any provisions of clauses A and E which actually or by implication declares that in the event such defense as appellant might make to an action brought against the assured for damages should be unsuccessful, it would pay the judgment. The amount of payment is confined to and provided for in clause K. It would therefore seem to follow that the fact that appellant made defense for the assured or his administrator in the action for damages brought by appellee, did not estop it from denying liability under its policy in the present action"

To the same effect are

Carter v. Aetna Life Ins. Co., 91 Pac. (Kans.) 178; 11 L. R. A. (N. S.) 1155;

Cayard v. Robertson, 131 S. W. (Tenn.), 864; 30 L. R. A. (N. S.) 1224.

From the above reasons, it is apparent that the findings of fact, and conclusions of law herein cannot stand, for the reason that they do not cover the issues presented by the pleadings, or are they justified by the evidence. The court erred in entering judgment against the defentant (Plaintiff in Error), and in favor of the plaintiff, because there is no evidence to justify the same, and the Court further erred in denying defendant's motion for a new trial

Therefore, it is contended that this case should be reversed.

Respectfully submitted,

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